

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 792 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

SHAH MANIBAI VELJI

Versus

SHAH MANILAL KALYANJI

Appearance:

MR BY MANKAD for Petitioner

MR CH VORA for Respondent No. 1, 2

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 03/05/96

ORAL JUDGEMENT

The appellant herein is the original plaintiff and the respondents are the original defendants. They are referred to as 'the plaintiff' and 'the defendants' respectively in this judgment.

2. The plaintiff filed Regular Civil Suit No. 19 of 1977 in the Court of the Civil Judge (Senior Division) Kutch at Bhuj for setting aside judgment and decree

passed in Special Civil Suit No. 8 of 1975 on the ground that the decree was obtained by fraud.

3. The plaintiff set-out the pedigree in the first instance as under :-

Umarsinh

Velaji - Death : 18/6/62

Widow Purbai : Death 12/5/72

Vishanji Manibai Lalbai 'Daughter'
'son' 'Daughter' Death : 24/9/50
Death:16/8/75 Plaintiff Manilal Deft. No.1.

According to the plaintiff her brother Vishanji Velaji filed Special Civil Suit No. 8 of 1975 against the plaintiff and the defendant no.1 of the present suit in the same Court for declaration of shares of the respective parties in the property in question and for partition. A preliminary decree was passed on 1/7/1975. It is the case of the plaintiff that the preliminary decree was obtained as a result of collusion between Vishanji and defendant no.1, although she was a party to that suit. Her say is that she could not remain present in the court at the trial of the earlier suit because she was illiterate and because Vishanji had given a promise to her that he would not do anything which would cause damage to her interest and, therefore, she did not remain present and defend the suit. Her case is that the property, though self-acquired of deceased Velaji, her father, was described as ancestral property falsely for taking larger share therein. It is, therefore, her case that the preliminary decree was obtained by Vishanji, since deceased, by practicing fraud on her.

4. The defendants resisted the suit as per written statement exh.30. While denying allegations contained in the plaint, it has been asserted that the defendant no.2 purchased right, title and interest of Vishanji in property bearing survey no.480 admeasuring 6 acres and 31 gunthas of Bidada village of Mandavi Taluka for Rs.16,500/- on 1/8/1975 and that he has also sold his 17% share in the said land to the defendant no.2 by a registered sale-deed dated 1/9/1975. He has further asserted that defendant no.2 was in actual possession of 83% of the said land as per the sale-deed. According to him the judgment and decree resulting into the preliminary decree challenged in the suit were passed in

accordance with law and that there was no fraud practised or no collusion practised on the plaintiff. He asserted that deceased Valaji had inherited the properties which were subject matter of Special Civil Suit No. 8 of 1975 from his father Umarsinh. Hence, all the properties are ultimately came to the possession of deceased Velaji were undivided Hindu Joint Family properties. Merely because the land in question was purchased in the name of Vishanji by Velaji it could not be said that it was not an ancestral property. The consideration for purchase of the land came from the income of property inherited from Umarsinh in possession of Vishanji Velaji. Hence, the said land also became ancestral property. The suit was, therefore, sought to be dismissed with cost.

5. The defendant no.2 filed written statement exh. 25 and while denying the allegations made in the plaint, asserted that he purchased share of deceased Vishanji for Rs.16,500/- and share of defendant no. 1 for Rs. 4,250/- in so far as the land in question is concerned. He accordingly claims his possession of 83% of the property in question on the basis of the registered sale-deeds executed by deceased Vishanji and defendant no.1 as stated above. He has contended that before filing the present suit plaintiff filed R.C.S. No. 134/1976 in the court of the Civil Judge (Junior Division) Mandavi, Kutch on 30/6/1976 for partition of properties of deceased Valaji and obtaining her 1/3rd share separately from the other shares. The said suit is pending. He further stated that in that suit also the plaintiff had admitted the preliminary decree passed in Special Civil Suit No. 8 of 1975, which has been sought to be challenged in the present suit. She admitted the defendant no.2's possession of suit property bearing survey no. 480 in her suit. When his possession was disturbed by the plaintiff the defendant no. 2 was required to file Spl. Civil Suit No. 15/1977 for obtaining relief of injunction and the said suit is also pending. It is, therefore, the stand of the defendant no.2 that on account of his suit for injunction the plaintiff has filed the present suit as a counter blast. He has, therefore, prayed for dismissal of the suit with cost, and compensatory cost in the sum of Rs.500/-.

6. Following issues were framed by the learned trial Judge :-

- (1) Whether the plaintiff proves that deceased Visanji Velji obtained judgment and preliminary decree in Special Civil Suit No. 8 of 1975 by practising fraud and mis-representation as pleaded in paras 5 and 6 of the plaint and in

collusion with deft. No. 1?

(2) Whether the plaintiff has not specifically pleaded the fraud practiced upon Court ? If yes, what is its effect ?

(3) Whether the suit is not correctly valued for the purpose of Court Fees ?

(4) Whether the plaintiff is entitled to reliefs as prayed for ?

(5) What order and Decree ?

No more issues sought."

7. The learned trial Judge answered the issues as under :-

(1) Not proved

(2) Does not survive

(3) Not proved.

(4) No.

(5) As per the final order.

8. Consequent upon the aforesaid findings the learned trial Judge dismissed the plaintiff's suit with cost as per judgment and decree dated 21/12/1978. The plaintiff has challenged the same in this appeal under sec. 96 of the Code of Civil Procedure.

9. The appealing having been taken up for final hearing today. The evidence was read and the submissions were made by the learned counsels appearing on behalf of the rival parties. Following points for determination have arisen for the consideration of this Court in this appeal :-

(1) Whether the plaintiff has succeeded in proving that deceased Vishanji Velaji obtained judgment and preliminary decree in Special Civil Suit No. 8 of 1975 by practising fraud and/or mis-representation as pleaded in paras. 5 and 6 of the plaint ? If yes, what is the effect on the preliminary decree passed in Special Civil Suit No. 8 of 1975 ?

10. Before the trial court one Mr. Kantilal Harshi,

son of the plaintiff was examined at exh. 48. Witness no.2 Mr. Manilal Mavji has been examined at exh. 54. Reliance was placed before the trial Court on the copies of the plaint and the power of attorney of the deceased in Special Civil Suit No. 8 of 1975, the said documents have been shown at exhs. 51 and 52. The certified copy of the preliminary decree and the judgment in the suit in question have been placed at exhs. 3/1 and 3/2 and being admissible in evidence have been treated as such.

11. On behalf of the defendants certified copies of the plaint in R.C.S. NO. 134/1976 have been placed on record at exh. 56. Appreciating the evidence of plaintiff's witness no.1 Kantilal Harsi, the learned trial Judge observed that the stand of the witness was that property bearing survey no. 480 was self-acquired property of deceased Velaji and that property bearing survey no. 756 was also accordingly self-acquired property. However, all other properties were not denied to the ancestral properties. Appreciating the evidence placed on the record of the case, the learned trial Judge has observed that even if the aforesaid two fields were purchased by deceased Velaji that could be said to be purchased from the income of the ancestral properties. However, appreciating the evidence of the witness the learned trial Judge has observed that the witness being aged 24 years and the properties having been purchased about 20 years back, it would not be possible to believe that the witness could have any personal knowledge in respect of the statements of facts made by him. As per the case of the plaintiff, property bearing survey no. 756 was purchased by deceased Velaji in the name of Vishanji. If that is so obviously the property would be ancestral unless it was established that the transaction was not a real transaction. In the facts and circumstances of the case, the learned trial Judge came to the conclusion that all the properties were treated as Joint Hindu Family properties by deceased Velaji. Hence, in the absence of any evidence on the record to show that the properties disputed in the suit were purchased by deceased Velaji out of his own earnings it could not be said that they were not the Joint Family properties of deceased Velaji. Even the property bearing survey no. 756 was treated as joint family property by deceased Velaji even though it is alleged that the same was purchased in his own name. This was one of the circumstances which lend great deal of support to the stand of the defendants that the properties were the ancestral properties. Whereas it was for the plaintiff to establish the case that the properties were self-acquired properties of deceased Velaji, that burden

of proof was not discharged by the plaintiff. This is over and above the fact that the plaintiff was herself a party to the suit in R.C.S. No. 8 of 1975, she could have defended the suit for showing that she had no 17% share in the properties on the basis of the properties being ancestral properties, but she had 1/3rd share in the properties on the basis of the properties being self-acquired properties of deceased Velaji. In that view of the matter, the learned trial Judge came to the conclusion that the preliminary decree could not be said to have been obtained by practising fraud to the effect that there was a false statement of fact that the properties were ancestral properties and were not self-acquired properties. With regard to mis-representation alleged to have been practised on her by deceased Vishanji the plaintiff did not step into the witness box to put up her case in that respect. Mr. Mankad, learned counsel for the plaintiff urged before this Court that the learned trial Judge erred in rejecting the application for adjournment given by the plaintiff on 8/11/1978. On going through the record of the suit from the proceedings (Rojnama) I find that there was sufficient opportunity afforded to the plaintiff to examine herself. However, at one stage the plaintiff had given Purshis that she did not want to examine herself. In my opinion, that was the end of the matter and it could not be said that she did not get sufficient opportunity to examine herself. That apart the learned trial Judge has appreciated the evidence as it stood before him. Referring to the evidence of witness Kantilal Harsi exh. 48, who stated that his mother did not remain present in the suit because Vishanji told her that there would not be any injury to her right or interest of 33% in the property in question. The learned trial Judge has observed that the story was improbable of being accepted. The plaintiff should have received the copy of the plaint alongwith the summons and she would have been put to her guard by saying therein that she was to get 17% share in the properties. Reference has been made to sec. 114 (1) of the Evidence Act for this purpose. Besides, Kantilal admitted that his mother and Vishanji has good relations formerly, that would mean that because Vishanji sold away his share in the suit properties to the defendant no.2, the plaintiff has come forward to challenge the decree and judgment in Special Civil Suit No. 8 of 1975. If there were good relations between the brother and sister, it would be difficult to believe that the brother would practice fraud on the sister for no reason worth the name. This reasoning given by the learned trial Judge is quite sound and convincing and the submissions made by the learned

counsel for the appellant contrary to the same cannot be accepted. It would be interesting to note that collusion has been alleged as between the defendant no. 1 and deceased Vishanji. Now if the defendant no.1 was to get 17% share on the basis that the properties were stated to be ancestral properties, he could hardly have any meeting of kinds for collusion with Vishanji if he was entitled to get 1/3rd share in the properties in question on the basis that the properties were self-acquired. Even this argument is quite convincing and the learned trial Judge has rightly based his judgment thereon. Referring to the plaint of R.C.S. No. 134 of 1976 filed by the plaintiff, learned trial Judge has observed that if the plaintiff has really any grievance against the preliminary decree passed in the earlier suit, she would not have remained silent in making mention about the same in her plaint of R.C.S. No. 134 of 1976. The averments are to the effect that although fraud was alleged to have been practised, she stated regarding her absence from the earlier suit that that was on account of circumstances other than the mis-representation on which the present suit was based. Man may lie but the circumstances may not. So that the absence of the case of mis-representation even in her suit R.C.S. No. 134/1976 has lent support to the conclusion that the decree was not obtained by fraud. The learned trial Judge has rightly made reference to decision of this Court in para. 9 of his judgment for supporting the conclusion which he has reached. The result is that the first point for determination shall have to be answered in negative. The second point for determination, therefore, shall not survive. Even if it survives the plaintiff cannot bring home her case for setting aside the preliminary decree passed in the earlier suit. The reason can well be found from the decision in the case of Bai Chanchal v. Ganpatram Jadavji & ors. reported in AIR 1965 Gujarat p.145, reference whereof has been made by the learned trial Judge.

Having heard the learned counsels for the parties in the matter, I am of the opinion that the judgment of the learned trial Judge is unassailable. The appeal is, therefore, dismissed with no order as to cost.

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